

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 05 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JAMES ALEX GREER, a married man,

Plaintiff - Appellant,

v.

YAVAPAI COUNTY, ARIZONA, a body
politic; JASON MORGAN, a married
man,

Defendants - Appellees,

and

G. C. BUCHANAN, aka Buck Buchanan,

Defendant.

No. 04-16711

D.C. No. CV-02-00637-JAT

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted June 15, 2006
San Francisco, California

Before: GOODWIN, O'SCANNLAIN, and THOMAS, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

James Greer appeals the district court's entry of judgment as a matter of law in favor of Deputy James Morgan on a number of claims arising from events following a 911 call. The district court held Morgan entitled to qualified immunity on Greer's claims of excessive force, unlawful arrest, and unlawful search of his home. We affirm.

I.

Greer contends that Morgan waived the defense of qualified immunity. He is wrong. Morgan pled qualified immunity as an affirmative defense in his answer.

II.

Qualified immunity analysis consists of two parts. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, if a violation occurred, was the right clearly established? *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Greer contends that the district court erred when it entered judgments as a matter of law due to qualified immunity on three claims: excessive force, unlawful

arrest, and unlawful search. He also argues that the district court erred when it sustained defendants' objection to his discussion of revoked consent to search his house.

A. Excessive Force

The district court granted qualified immunity to defendant Morgan because "Morgan was not personally involved in the use of force," and cited *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). There was no error there.

Greer was taken to the ground by Officer Evers after failing to comply with Morgan's order to get on the ground. The disturbance had reached a level of noise and confusion that would justify reasonable officers in believing that a threat to officer safety existed. Given the information available to Morgan at the time, it was not objectively unreasonable to order Greer to the ground in response to the volatile situation. Taking the evidence in the light most favorable to Greer, a jury could not find that Morgan recklessly or intentionally provoked a violent response from Greer.

B. Unlawful Arrest

Greer argues that at the time he was arrested, Morgan could not have reasonably believed that he had probable cause to arrest him. Once Greer refused

to get down on the ground and moved toward Morgan, a reasonable officer could have probable cause to arrest him for aggravated assault. Taking the evidence in the light most favorable to Greer, he was arrested because he refused to get down on the ground, yelled at the officers to leave his property, and walked back toward them and his house. In this light, a reasonable officer responding to a “man with a gun” emergency telephone dispatch could be in reasonable apprehension of imminent physical injury. The district court did not err in determining that under the circumstances, the officer could have reasonably believed that he had probable cause to make an arrest.

C. Unlawful Search

Greer argues that the district court erred when it granted judgment as a matter of law to Morgan on the second search claim.

In the light most favorable to Greer, the officers searched his house for twenty to thirty minutes following the takedown despite Greer’s yelling that officers had no permission to be in his house. At some point Greer told Sergeant Jarrell that he had given permission to officers to enter his house, and asked the sergeant to go look inside. After this, Greer again yelled that he wanted the officers out of his house.

The district court ruled that Morgan reasonably believed he had Greer's consent to search the house a second time. In the order denying Greer's motion for a new trial, the district court explained that "[i]n granting qualified immunity the Court necessarily held that the officer reasonably believed he had consent at the time of the search."

In reaching that conclusion the district court referred to the second search as a distinct event, commencing with Greer's "go look, sir, please" statement. Conversely, the court treated the 20-30 minute portion of the search preceding this statement as the "initial search," which went to the jury. Under the circumstances in this case – having responded to the telephoned "man with a gun" alarm, and having heard Greer's statement requesting that officers enter his home to look around – a reasonable officer could reasonably believe he had consent to search the home. The district court did not err in granting judgment as a matter of law.

D. Continued Evidentiary Search After Revocation of Consent

Finally, Greer argues that the district court erred when it sustained defendants' objection during Greer's closing argument "when Greer's counsel sought to argue that Defendants had failed to timely respond when Greer withdrew his alleged consent." Because judgment as a matter of law was appropriate on the

underlying unlawful search claim, the district court did not err by preventing Greer from arguing aspects of this claim to the jury.

III.

Given the facts in the light most favorable to Greer, it would not be clear to a reasonable officer that it was unlawful to order Greer to the ground, to arrest him for aggravated assault, or to search his house. The judgment of the district court is AFFIRMED.